FILED
MAR 23 195
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM, INC., AND HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HYMAN I. FISCHBACH,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for a writ of certiorari	1
Statement of matters involved	2
Jurisdiction	5
Questions presented	5
Reasons relied on for granting writ	9
Brief in support of petition for writ of certiorari	9
Opinion of the court below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	10
Argument	11
Point I—At the time petitioners filed the notice of dismissal, they had an absolute right to dismiss their action	11
Point II—Petitioners' application for interlocutory relief and the hearings thereon did not affect their right to dismiss this action without order of court	12
Point III—The filing of the voluntary dismissal rendered this case moot	13
Conclusion	14
Appendix "A"—Opinion of the United States Court of Appeals for the Second Circuit	15

Table of Cases Cited

A. B. Dick Co. v. *Marr*, 197 Fed. 2d 498	14
Bryan v. *Smith*, 174 Fed. 2d 212	14
Compania Flomari De Vapores, S. A. v. *American Hellenic Corp.*, 8 F. R. D. 426	12
Cone v. *West Virginia Pulp and Paper Company*, 330 U. S. 212	11, 13
Fleetwood, et al. v. *Milwaukee Mechanics Ins. Co.*, 7 F. R. D. 680	12

Page

Jones v. *Securities and Exchange Commission*, 298 U. S. 1 ..... 11, 13
Kilpatrick v. *Texas and Pacific Railway Company*, 166 Fed. 2d 788 11
Maryland Casualty Company v. *Latham*, 41 Fed. 2d 312 14
Pennsylvania Railroad Company v. *Daoust Construction Company*, 193 Fed. 2d 659 11
United States v. *Alaska Steamship Company*, 253 U. S. 113 14
Venner v. *Graves*, 255 Fed. 2d 686 11
Wilson and Company, Incorporated v. *Fremont Cake and Meal Company*, 83 Fed. Supp. 900 12

STATUTES AND OTHER AUTHORITIES CITED

Corpus Juris Secundum, Volume 27, Section 8, Pages 161-162 13

Federal Rules of Civil Procedure:

Rule 23(c) 5, 11
Rule 41(a)(1) 5, 10, 11, 12
Rule 65 11
Rule 66 11

United States Code, Title 28:

Section 1254 ..... 5, 9
Section 1332 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM, INC., AND HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY

Respondents and Appellants Below

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Harvey Aluminum Inc. and Harvey Machine Co., Inc. pray that a writ of certiorari issue to review the order and judgment entered March 16, 1953 in Appeal No. 22624 in the United States Court of Appeals for the Second Circuit entitled "Harvey Aluminum Inc. and Harvey Machine Co., Inc., Plaintiffs-Appellees, against American Cyanamid

Company, Berbice Company Limited and Reynolds Metals Company, Defendants-Appellant," reversing orders of the United States District Court for the Southern District of New York (1) denying defendants' motion to vacate plaintiffs' notice of voluntary dismissal of this action and (2) denying defendants' motion for an injunction.

Statement of Matters Involved

This action was brought on December 5, 1952 by Harvey Aluminum Inc. against American Cyanamid Company for specific performance of an agreement made November 26, 1952 to sell the tangible assets of Cyanamid's subsidiary Berbice Company Limited, a corporation of British Guiana, for the agreed purchase price of $400,000. The assets in controversy consist of extensive facilities in British Guiana for the mining and processing of bauxite ore on lands of the British Crown in that colony.

Upon filing its complaint, and the undertaking required by the district court, Harvey Aluminum obtained an ex parte order temporarily restraining the transfer of such assets by Cyanamid to anyone other than plaintiff pending plaintiff's application for an injunction pendente lite (R. 39-58). However, when that application came on for hearing, it was shown that on the day this action was begun Cyanamid's subsidiary Berbice had accepted payment of the purchase price from Reynolds Metals Company, in consideration of which it was agreed that on December 22, 1952 it would transfer such assets to Reynolds (R. 60). The district court granted the plaintiff leave to add Harvey Machine Co., Inc. and Berbice Company Limited as additional parties plaintiff and defendant, respectively, while such hearing was in progress. Upon denying plaintiffs' motion for a preliminary injunction, the district court noted that Reynolds Metals Company, although then not a party, had actual notice of plaintiffs' claim to the prior purchase of the

Berbice properties, and thereupon granted plaintiffs leave to join their separate claim against Reynolds with the claim upon which the action was originally brought (R. 113-115). Accordingly, Reynolds was brought in as an additional party defendant on plaintiffs' charge that Reynolds had tortiously induced Cyanamid and Berbice to breach their agreement to sell the Berbice properties to plaintiffs (R. 107-111). Relief against Reynolds was sought only in the alternative that, if Cyanamid and Berbice were not required to specifically perform their agreement with plaintiffs, Reynolds be decreed a trustee ex maleficio of the agreement which it made with said defendants on December 5th and hold any title received thereunder for the plaintiffs' benefit (R. 110-111).

Upon the entry in the district court of the order denying plaintiffs' motion for a preliminary injunction on December 17, 1952, plaintiffs filed a notice of appeal and applied to Judge Augustus N. Hand for, but did not obtain, a stay to prevent the transfer by Cyanamid and Berbice of title to the property in controversy. Plaintiffs' appeal from the district court's denial of their application for a preliminary injunction became moot by the transfer of such title on December 22nd. Plaintiffs therefore abandoned their appeal and neither docketed nor otherwise perfected it.

Thereafter the time of the defendants to answer the complaint was extended as to Cyanamid and Berbice until January 19 and as to Reynolds as to February 2, 1953. Appropriate orders of the court were entered by stipulation of counsel on January 2, 1953 (R. 129, 130).

On January 16, 1953 defendants, despite the provisions of Rule 65 of the Federal Rules of Civil Procedure, obtained without bond an ex parte order from the district court temporarily restraining plaintiffs and directing them to show cause why they should not be permanently enjoined from commencing or prosecuting any action in British Guinea

or in any other jurisdiction involving the property in controversy. (R. 15-17).

Before defendants' motion came on for hearing, plaintiffs voluntarily filed a notice of dismissal of the entire action, pursuant to the authority of Rule 41(a)(1) of the Federal Rules of Civil Procedure, and served copies thereof upon counsel for all defendants. (R. 131). None of the defendants had either answered or made a motion for summary judgment prior therto.

On January 20, 1953 defendants' motion to enjoin plaintiffs from bringing an action in any other jurisdiction was heard and denied by the district court. (R. 17). Later the same day, on defendants' application, the district court issued an order requiring plaintiffs to show cause forthwith why the notice they had previously filed voluntarily dismissing this action should not be vacated. (R. 4-5). After hearing thereon, the district court denied defendants' motion. (R. 5).

Defendants thereupon appealed to the Court of Appeals and on January 26, 1953 obtained from Judge Augustus N. Hand a temporary stay enjoining plaintiffs from bringing any other suit with respect to the property in controversy in British Guinea or elsewhere against any of the defendants. Immediately after obtaining such stay, defendants themselves initiated proceedings in British Guinea in an attempt to transfer to Reynolds the mining leases and concessions Cyanamid and Berbice had agreed originally to surrender, or, if governmental and other requisite consent therefor could be obtained, to transfer to plaintiffs. On February 13, 1953, after hearing argument on the merits of defendants' appeals, the Court of Appeals issued an order modifying in part the stay previously granted against plaintiffs by allowing them to take any

steps in British Guinea that might be necessary to contest such proceedings.

On March 16, 1953 the Court of Appeals reversed the orders of the district court from which defendants appealed and remanded the case to the district court with the direction that plaintiffs' notice of dismissal be vacated, that defendants' motion for an injunction be determined in the exercise of discretion, and that pending such determination the stay granted by the Court of Appeals, as modified, continue in effect.

The opinion of the Court of Appeals has not yet been officially reported. A copy of such opinion is printed as an appendix to the brief submitted herewith.

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254. Jurisdiction of the district court was invoked under Title 28, United States Code, Section 1332, and was based upon the diversity of the citizenship of the parties and the amount in controversy.

Questions Presented

1. Do the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure grant the plaintiff the unqualified right to dismiss without court order a civil action not subject to the provisions of Rule 23(c) or Rule 66 by filing a notice of dismissal before service by any adverse party of an answer or motion for summary judgment where the dismissal of such action is not governed by any statute of the United States?

2. May the provisions of such Rule be availed of by the plaintiff to so dismiss such an action after application for interlocutory relief has been made by plaintiff and extensive hearings have been had thereon?

3. Is a notice of dismissal so filed in such an action effective to dismiss it.

(a) as to parties defendant against whom such interlocutory relief had been sought?

(b) as to parties added as defendants after the conclusion of hearings upon plaintiff's application for interlocutory relief and against whom the only claim asserted was a separate claim for alternative relief?

4. Did the plaintiffs' filing of their notice of dismissal terminate this action?

Reasons Relied On for Granting Writ

1. The decision of the Court of Appeals is in conflict with applicable decisions of this court and with the express provisions of the Rules adopted to govern the procedure in the District Courts in civil actions.

2. The decision of the Court of Appeals establishes criteria in the exercise of the right of a litigant to dismiss his suit which are contrary to long established rules and clearly enunciated judicial policy. Additionally such decision imposes restrictions upon the dismissal of civil actions without order of court beyond those which were prescribed by this court to govern such matters. In so doing the Court of Appeals has so far departed from the prescribed and usual course of judicial proceedings as to warrant the exercise of this court's supervisory power to govern procedure in the District Courts.

3. The questions of Federal law with which the decision herein deals are substantial and important in the conduct of civil litigation in the District Courts. Prior to the decision herein, the Rules governing such questions had been uniformly construed to preserve the right of a plaintiff to a voluntary dismissal in the circumstances and at the time

prescribed. The meaning and the application of the standards established by the amendments to the Rules adopted by this Court in 1948 are rendered doubtful and uncertain by the decision. The decision of the Court of Appeals on these questions conflicts with its own prior decisions and with the decision of another Court of Appeals on the same subject matter. The questions presented herein should be settled by this Court.

Respectfully submitted,

HYMAN I. FISCHBACH,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM INC. AND HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY,

Respondents and Appellants Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court of Appeals has not yet been officially reported. A copy of such opinion is included in the appendix hereto.

Jurisdiction

1. The date of the opinion to be reviewed is March 16, 1953.

2. Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254.

Statement of the Case

A statement of the matter involved has already been made in the petition which accompanies this brief under the heading "Statement of Matters Involved." Such statement is respectfully incorporated herein.

Specification of Errors

1. The Court of Appeals erred in holding that plaintiffs, after application for interlocutory relief upon which extensive hearings had been had, could not without order of court dismiss this action pursuant to Rule 41(a)(1) by filing a notice of dismissal before service by any adverse party of an answer or motion for summary judgment.

2. The Court of Appeals erred in holding that the voluntary dismissal filed by plaintiffs herein was ineffective to dismiss this action.

3. The Court of Appeals erred in holding that Rule 41(a)(1) did not authorize plaintiffs to dismiss this action without order of court as against the defendant Reynolds Metals Company.

4. The Court of Appeals erred in reversing the order of the District Court denying defendants' motion to vacate their notice of dismissal and in remanding the case with direction to vacate plaintiffs' notice of dismissal.

5. The Court of Appeals erred in reversing the order of the District Court denying defendants' motion for an injunction and in remanding it for hearing.

ARGUMENT

Point I

At the Time Petitioners Filed the Notice of Dismissal, They Had an Absolute Right to Dismiss Their Action

The applicable Federal Rule of Civil Procedure provides:

> "*Rule 41. Dismissal of Actions*
>
> (a) *Voluntary Dismissal: Effect Thereof*
>
> (1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs * * *."

Plaintiffs' notice of dismissal was filed prior to the service by any of the adverse parties of an answer or a motion for summary judgment. This action is not subject to Rule 23(c) (relating to class actions) nor to Rule 66 (relating to actions in which a receiver has been appointed). Accordingly the nature and status of the action when the notice of dismissal was filed was such as to squarely and literally permit its dismissal by plaintiffs without order of court in accordance with the provisions of Rule 41(a)(1).

Cone v. *West Virginia Pulp & Paper Company*, 330 U. S. 212;

Jones v. *Securities & Exchange Commission*, 298 U. S. 1;

Pennsylvania R. Co. v. *Daoust Const. Co.*, 193 F. 2d 659 (7th Cir., 1952);

Kilpatrick v. *Texas & P. Ry. Co.*, 166 Fed. 2d 788 (2d Cir., 1948);

Venner v. *Graves*, 255 Fed. 686 (2nd Cir., 1919);

Wilson & Co., Inc., v. *Fremont Cake & Meal Co.*, 83 F
Supp. 900 (D.C. Neb., 1949);
Compania Flomari De Vapores, S.A. v. *American He*
lenic Corp., 8 F.R.D. 426 (S. D. N. Y., 1948);
Fleetwood, et al. v. *Milwaukee Mechanics Ins. Co.*,
F.R.D. 680 (D. C. W. D. Mo., 1947);
Sachs v. *Italia Societa Anonima de Navigazione*, 30 F
Supp. 442 (D. C. N. Y., 1939).

Despite the Rule and the application and constructio
thereof by the Federal Courts, the Court of Appeals hel
the dismissal herein could not be filed as of right and
nullity which should be vacated.

Point II

**Petitioners' Application for Interlocutory Relief and th
Hearings Thereon Did Not Affect Their Right to Dismis
This Action Without Order of Court**

It was the opinion of the Court of Appeals that Rule 41(a
(1) should not be literally applied herein because of th
extensive hearings held on plaintiffs' application for a pre
liminary injunction and, therefore, although the voluntary
dismissal was filed prior to the service of an answer o
motion for summary judgment, the dismissal should b
vacated. It was also the view of the Court of Appeals tha
plaintiffs' application for interlocutory relief barred th
voluntary dismissal of this action even as against a party
added as a defendant herein after such action had beer
concluded notwithstanding the claim asserted against such
defendant was separate, distinct and solely in the alterna
tive. It is respectfully urged that the opinion of the Cour
of Appeals is fraught with error.

The general rule as to voluntary dismissals is set forth in 27 C.J.S. Sec. 8, at pp. 161-2:

> "A statute authorizing a dismissal or non-suit will, generally, be liberally construed in favor of the right of plaintiff to dismiss or take a non-suit since it is the policy of the government to discourage rather than to encourage, litigation; * * * On the other hand a statute prohibiting the dismissal or the granting of a non-suit, being in derogation of the common law, must be strictly construed and will not be extended to include cases not within its express terms. [Citing cases.]"

The applicable Federal Rule of Civil Procedure authorized plaintiffs to dismiss this action without order of court "*at any time* before service by the adverse party of an answer or motion for summary judgment." Nonetheless, the Court of Appeals viewed plaintiffs' dismissal of this action without order of court as "unauthorized", "arbitrary", and as filed at "an advanced stage."

The holding of the Court of Appeals is an unauthorized and unwarranted invasion of the rights reserved to a plaintiff by the provisions of the Rule and is squarely in conflict with decisions of this Court.

In *Cone* v. *West Virginia Pulp & Paper Company*, 330 U. S. 212, 215, this Court said:

> "Rule 41(a)(1) preserves this unqualified right of a plaintiff to a dismissal without prejudice prior to the filing of defendant's answer."

See also, *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 19.

Point III

The Filing of the Voluntary Dismissal Rendered This Case Moot

Plaintiffs' notice of dismissal was filed and served on all parties to this action before defendants' motion for an in-

junction came on for hearing in the district court. It was entirely appropriate, when notwithstanding plaintiffs' dismissal of the action defendants pressed for a determination of their motion, that the district court should have denied it, even if not in the exercise of discretion.

It has long been well settled that the "voluntary dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought." *A. B. Dick Co.* v. *Marr*, 197 Fed. 2d 498, 502 (2nd Cir., 1952) (citing *Maryland Casualty Co.* v. *Latham*, 41 Fed. 2d 312, 313 (5th Cir., 1930)).

See also, *Bryan* v. *Smith*, 174 Fed. 2d 212, 214 (7th Cir., 1949).

Such dismissal effectively terminated the authority of the District Court to grant relief in the action for the reason that the case had become moot.

U. S. v. *Alaska S. S. Co.*, 253 U. S. 113, 116.

Since the dismissal so filed was authorized by Rule 41 (a)(1), it was clear error on the part of the Court of Appeals to have entertained defendants' appeal from the district court's denial of such motion, and it was likewise error for the Court of Appeals to reverse the order of the district court and remand defendants' motion for an injunction for hearing.

Conclusion

A writ of certiorari as prayed for in the petition herein should be allowed.

Respectfully submitted,

HYMAN I. FISCHBACH,
Counsel for Petitioners.

APPENDIX "A"

Opinion of the United States Court of Appeals for the Second Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 22624

HARVEY ALUMINUM INC., AND HARVEY MACHINE CO., INC., Plaintiffs-Appellees,

v.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED, AND REYNOLDS METALS COMPANY, Defendants-Appellants

OPINION—March 16, 1953

Before Augustus N. Hand, Chase and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, Judge

From an order denying defendants' motions to vacate plaintiffs' notice of voluntary dismissal and from an order denying defendants' motion for a preliminary injunction, the defendants appeal. Reversed and remanded.

Donovan Leisure Newton Lumbard & Irvine, Attorneys for Defendants-Appellants, American Cyanamid Company and Berbice Company Limited; Walter R. Mansfield, William C. Garrett and Robert F. Morton, Counsel.

Lundgren, Lincoln, Peterson & McDaniel, Attorneys for Defendant-Appellant Reynolds Metals Company.

Hyman I. Fischbach, Attorney for Plaintiffs-Appellees Harvey Aluminum Inc., and Harvey Machine Co., Inc.; Hyman I. Fischbach and Vincent J. Crowe, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

This action was brought on December 5, 1952 by Harvey Aluminum Inc. (hereafter referred to as "Harvey"),

against American Cyanamid Company (hereafter referred to as "Cyanamid") seeking specific performance of an alleged agreement to sell the tangible assets of Cyanamid's subsidiary Berbice Company Limited (hereafter referred to as "Berbice"). These assets consist of facilities for the processing and mining of bauxite ore from certain land in British Guiana. At the time of the filing of its complaint Harvey obtained an *ex parte* temporary restraining order pending the hearing and determination of its motion for an injunction *pendente lite* against the sale or transfer of the assets in question by Cyanamid to anyone other than the plaintiff. At the conclusion of a hearing before Judge Sugarman, during the course of which Harvey Machine Co., Inc., and Berbice were added as parties plaintiff and defendant respectively, plaintiffs' motion for a preliminary injunction was denied. The district court found, *inter alia*, that the plaintiffs' chances of success on the ultimate trial were "remote, if not completely nil." On December 15, after the temporary stay had been dissolved by Judge Sugarman, an amended complaint was filed by the plaintiffs adding Reynolds Metals Company (hereafter referred to as "Reynolds") as a defendant and seeking as additional relief that any assets received by Reynolds from Berbice be subjected to a trust in favor of the plaintiffs. On December 17 notices of appearance were filed on behalf of all three defendants. On the same day plaintiffs filed a notice of appeal from Judge Sugarman's order denying a preliminary injunction, also entered on December 17. An application by the plaintiffs for a stay pending appeal was denied by Judge Augustus N. Hand on December 18, and on December 22 Berbice transferred its assets to the defendant Reynolds. Nothing has been done either to perfect or dismiss the appeal. Fearing that the plaintiffs were about to bring suit in British Guiana, the defendants obtained an *ex parte* order from Judge Conger on January 16, 1953, temporarily staying the plaintiffs and directing them to show cause why they should not be enjoined from commencing any legal proceeding in any other jurisdiction involving the same subject matter. On January 19, prior to the return day of the order to show cause, the plaintiffs

filed a notice of dismissal stating that they "hereby voluntarily dismiss this action as against all defendants." Judge Clancy on January 20, 1953 denied a motion by the defendants to vacate this notice of dismissal, and also denied the defendants' motion for injunctive relief without opinion. This appeal is from the district court's denial of these two motions. An order to show cause containing a temporary stay against the bringing of any legal proceeding by the plaintiffs involving the same questions outside of this jurisdiction was issued by Judge Augustus N. Hand on January 26, and on the hearing of the order to show cause a motion for a stay pending the disposition of the defendants' appeal was granted by this court on February 3. Following the temporary stay against the plaintiffs the defendants initiated proceedings in British Guiana to secure the consent of the government there to the transfer of certain leases. On February 13 an order was issued modifying the stay previously granted against the plaintiffs by allowing them to take any steps that might be necessary to contest these proceedings.

The plaintiffs contend that their attempted voluntary dismissal without a court order was authorized by Rule 41(a) 1 of the Federal Rules of Civil Procedure which provides that: " * * * an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment * * *." The purpose of this rule is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined. 5 Moore's Fed. Practice 1007 (2d ed.). The amount of research and preparation required of defendants was stressed by the Committee Note when Rule 41(a) 1 was amended in 1948 as a reason for adding the reference to a motion for summary judgment. 5 Moore's Fed. Practice 1005 (2d ed.). The hearing before Judge Sugarman on the plaintiff's motion for a preliminary injunction required several days of argument and testimony, yielding a record of some 420 pages. Further, the merits of the controversy were squarely raised and the district court in part based its denial of the injunction on its con-

such governmental consent would in any way prejudice the plaintiffs' rights, we think that this is an additional circumstance requiring the exercise of the discretion of the district court. Accordingly, the denial of the defendants' motion for a preliminary injunction is reversed and the case is remanded for a hearing thereon. Pending the hearing and determination of this motion the stay heretofore granted by this court, as modified, will continue in effect. But the continuance of this stay is not to be regarded as in any way intimating an opinion of this court as to whether the district court should or should not issue the injunction.

Reversed and remanded.

(7390)

10

FILED
MAY 8 195
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM INC. and HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE S. LEISURE,
Attorney for Respondents, American Cyanamid Company and Berbice Company Limited.

WALTER C. LUNDGREN,
Attorney for Respondent, Reynolds Metals Company.

DONOVAN, LEISURE, NEWTON & IRVINE,
Two Wall Street,
New York, New York.

LUNDGREN, LINCOLN, PETERSON & McDANIEL,
63 Wall Street,
New York, New York.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Rules of Civil Procedure Involved	3
Statement	4
Argument	8
POINT I—The notice of dismissal without leave of Court was not effective to dismiss either the entire action, or to dismiss any claim therein	8
(a) The notice of dismissal without leave of Court was ineffective to dismiss the action against American Cyanamid Company and Berbice Company Limited	8
(b) The notice of dismissal was ineffective against Reynolds Metals Company	10
POINT II—There is no conflict or other special reason for review by this Court	13
POINT III—The remand of the respondents' motion for injunctive relief was proper	15
Conclusion	15

TABLE OF CASES CITED

Butler v. Denton, 150 F. (2d) 687 (10th Cir., 1945)	9
Chicago & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702	14

PAGE

Coffee v. Planters' Bank of Tennessee, 13 How. (54 U. S.) 183, 186-190 12

Compania Flomari De Vapores, S. A. v. American Hellenic Corp., 8 F. R. D. 426 (S. D. N. Y., 1948)... 14

Cone v. West Virginia Pulp & Paper Company, 330 U. S. 212 13

Fleetwood, et al. v. Milwaukee Mechanics Ins. Co., 7 F. R. D. 680 (W. D. Mo., 1947) 14

Interstate Refineries v. Barry, 7 F. 2d 548, 550 (C. A. 8, 1925) 12

Jennings v. United States, 264 F. 399, 404, 405 (C. A. 8, 1920) 12

Jones v. Securities and Exchange Commission, 298 U. S. 1 13

Kilpatrick v. Texas & Pacific Railway Co., 166 F. 2d 788, 792 (2d Cir., 1948), cert. den'd 335 U. S. 814 ...9, 14

North Carolina Mining Co. v. Westfeldt, 151 F. 290, 296 (C. C. W. D., No. Carolina, 1907) 12

Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., et al., 133 F. 2d 187 (C. A. 2, 1943) 11

Pennsylvania Railroad Co. v. Daoust Construction Co., 193 F. 2d 659, 661 (7th Cir., 1952) 9, 14

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138 14

Ring v. Spina, 148 F. 2d 647 (C. A. 2, 1945) 15

Sachs v. Italia Societa Anonima de Navigazione, 30 F. Supp. 442 (S. D. N. Y., 1939) 14

Silver King Coalition Mines Co. v. Silver King C. M. Co., 204 F. 166, 169 (C. A. 8, 1913) 12

Venner v. Graves, 255 Fed. 686 (2d Cir., 1919) 13

PAGE

Wilson & Company, Inc. v. Fremont Cake and Meal Company, 83 F. Supp. 900 (D. C. Neb.) 14
Winkelman v. General Motors Corporation, et al., 48 F. Supp. 490 (S. D., N. Y., 1942) 11

FEDERAL RULES OF CIVIL PROCEDURE

Rule 2 11
Rule 3 11
Rule 8 11
Rule 18 11
Rule 20 10
Rule 21 .....3, 11, 12
Rule 41 .....8, 11
Rule 41(a)(1) 3, 9, 10, 11, 13
Rule 42 11
Rule 54(b) 11
Rule 73(a) 10

TEXTBOOKS

1 Federal Practice and Procedure, pp. 232, 562 11
5 Moore's Federal Practice (2d Ed. 1951), pp. 1007-08 .....9, 14
65 Harvard Law Review 1050 12